Supreme Court, U.S.
FILED
FEB 19 1998
OFFICE OF THE CLERK

No. 97-878

In The

Supreme Court of the United States

October Term, 1997

CITY OF BIRMINGHAM, ALABAMA,

Petitioner,

vs.

SCOTT THOMAS MORRO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 4

I. The Basis For The Petition Was Not Timely Raised On Appeal To The Court Of Appeals. 4

II. The Decision Below Is Nothing More Than The Affirmance Of A District Court's Discretionary Rulings Rendered As Part Of Its Role In Formulating Issues To Be Tried; As Such, It Carries No Weighty Considerations Justifying The Exercise Of Certiorari Jurisdiction. 6

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

Braswell v. ConAgra, Inc., 936 F.2d 1169 (11th Cir. 1991) 9

Hodges v. United States, 597 F.2d 1014 (5th Cir. 1979) 9

Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364 (11th Cir. 1988) 9

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 2, 3, 4, 5, 7, 8, 9, 10, 11, 12

Contents

Page

Pacific Indemnity Co. v. Broward County, 465 F.2d 99 (5th Cir. 1972) 4

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1996) 7

Santiago v. Lykes Bros. S.S. Co., 986 F.2d 423 (11th Cir. 1993) 9

Walker v. Anderson Elec. Connectors, 944 F.2d 841 (11th Cir. 1991) 9

United States Constitution Cited:

First Amendment 1, 2, 11

Rules Cited:

Fed. R. Civ. P. 16 7

Fed. R. Civ. P. 50 .....2, 3, 5, 8, 9

APPENDIX

Appendix A — Brief of City of Birmingham (Appellant) to the Court of Appeals 1a

STATEMENT OF THE CASE

Morro brought suit against The City of Birmingham ("The City") for the violation of his rights under the First Amendment of the United States Constitution. In 1990, Morro attended as a spectator the trial of Erica Arrington, the daughter of the Mayor of Birmingham. His attendance at this public trial, which represented a show of support for a fellow officer, was viewed as a demonstration of disrespect for the Mayor. *See Morro v. City of Birmingham*, 926 F. Supp. 1033, 1035 [34a].[1] As a result, the Police Chief of Birmingham, Arthur Deutcsh, ordered the suspension of Morro for thirty days without pay. However, the stated reason for the suspension was that Morro had deliberately been unprepared to testify as an arresting officer in another matter, implying that Morro had obstructed justice. Morro's suspension was effective immediately and received widespread attention throughout the police department humiliating Morro and causing considerable damage to his reputation.

The order of suspension was not subject to any appeal or review procedure before having operative effect; instead, Morro's only recourse was with the Jefferson County Personnel Board, a body wholly separate from the City, which hears appeals from personnel decisions. Because the appeal procedures did not interrupt the operation of the suspension, Morro served out the entire thirty day term without pay. The Personnel Board later issued a decision "rescinding" the order of suspension and awarding back pay; however, the Board does not have the power to award compensatory damages for mental anguish, humiliation, or damage to reputation.

The City participated in two pretrial conferences during which the District Court formulated the issues for trial. The

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1. The City has never contested that attendance at this trial was an activity protected by the First Amendment. [All references to Petitioner's Appendix appear in brackets.]

City was under the duty to identify those issues which were to be tried; *Monell* or any related theory was not identified by the City in the pretrial proceedings or orders as a contested matter. 926 F. Supp. at 1041. [46a].[2]

At the three day trial, Morro proffered three witnesses whose testimony would have shown that the City and the Chief of Police engaged in a pattern and practice of retaliation in response to similar First Amendment activities. This proffer was objected to by the City on the basis of relevancy. The District Court explicitly stated his understanding, derived from the pretrial proceedings, that the City had conceded its liability for the chief's conduct (the *Monell* issue). The District Court made a direct inquiry to the City's counsel to state whether this understanding was correct. *Morro v. City of Birmingham*, 117 F.3d 508, 511-12 [6a]. The City communicated its assent by remaining silent as the District Court sustained the objection and barred Morro's witnesses from testifying. Morro, believing any doubt about the *Monell* issue had been resolved, rested his case without having presented any pattern and practice witnesses. The City made a Rule 50 motion making no reference to *Monell* or otherwise attempting to distance itself from the chief as the final policymaker.

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2. The City contends that by briefly referencing *Monell* type issues in its initial motion to dismiss in 1992 and again in a motion for summary judgment in 1993, it could not have concealed the matter during the issue formulation process of the pretrial conference occurring in 1995. It is this very type of argument that pretrial issue formulation is designed to foreclose. Adversaries and the court are not obliged to search years of court filings for oblique references in shotgun pleadings and long forgotten motion papers to ascertain the triable issues. Nor can counsel safely avoid their obligation to identify contested matters by hiding them from view behind general denials to "each and every material allegation of plaintiff's complaint filed in this cause". [81a].

The City presented its witnesses; no evidence was offered by the City relative to the authority of the Personnel Board, the scope of the Chief's authority or other matters probative to the *Monell* issue. The City rested, the evidence was closed and the City renewed its Rule 50 motion, again making no reference to the *Monell* issue.

The case proceeded to the charge conference. The City presented a requested instruction to the District Court which read:

> You are instructed that the Chief of Police was an official whose acts constitute final official policy of the City of Birmingham.

117 F.3d at 512 [7a]. The City abruptly reversed its position, withdrew the affirmative charge which confirmed its earlier concession of the *Monell* issue, and raised for the first time in the trial the argument that the chief was not an official whose acts constituted final official policy of the City.

Following trial, the City renewed its Rule 50 motion including arguments based on *Monell*. The District Court issued a lengthy decision addressing the unfair surprise generated by what it termed "The Belated *Monell* Defense". 926 F. Supp. at 1036 [35a]. The District Court determined that the issue had not been preserved by proper identification at pretrial, and the City's conduct in "concealing" the issue estopped it from relying on *Monell*. 926 F. Supp. at 1041 [45a-46a]. The City appealed to the Eleventh Circuit but did not challenge the District Court's application of judicial estoppel even though that was a principal underpinning of the District Court's ruling. (*See* Appendix A, City's Brief to Court of Appeals). It was only after the panel of the Eleventh Circuit affirmed the decision of the District Court did the City first challenge, in its Suggestion for Rehearing En

Banc, the discretionary findings of the District Court that the issue was not properly preserved.

The Petitioner in its Statement of the Case opines that the City could not be liable "on a proper application of governing principles". [note 1, 3]. Morro disputes this and contends that the Eleventh Circuit's suggestion that the City probably would have prevailed had it preserved the issue is erroneous. But because the City's concessions at the pretrial conferences and at trial dispensed with this issue, there was no need nor opportunity for Morro to develop a complete record from which the issue could have been properly adjudicated. As a result the Court of Appeals did not determine this issue; its opinion references it only in terms of what "probably" would have occurred had the issue been raised. 117 F.3d 514-15 [12a-13a].

REASONS FOR DENYING THE WRIT

I.

THE BASIS FOR THE PETITION WAS NOT TIMELY RAISED ON APPEAL TO THE COURT OF APPEALS.

The issue on which the petition is premised was not raised by the City to the District Court nor to the Court of Appeals until the Suggestion for Rehearing En Banc. A careful examination of the City's principal brief (no reply brief was filed) to the Court of Appeals will not reveal any reference to the issue which they now contend to be one having important ramifications; no mention of "affirmative defense," "waiver," "judicial estoppel," "burden of proof," the effect of the pre-trial conferences and orders, the District Court's description of *Monell* as a "defense", nor to the case principally relied on by the petitioner, *Pacific Indemnity Co. v. Broward County*, 465 F.2d 99 (5th Cir. 1972), is to be found. (*See* Appendix A, City's Brief to Court of Appeals).

The District Court issued its extensive opinion on the City's Rule 50 motion on April 12, 1996 (with addendum to the opinion dated April 17, 1996) which included the lengthy section entitled "The Belated *Monell* Defense". The District Court set out in detail the circumstances supporting his conclusions that the Monell "defense" had been "concealed", that the City's conduct at trial and pretrial formed the basis of judicial estoppel, and that the City had affirmatively conceded *Monell*. 926 F. Supp. 1036-37 [35a-46a]. It described the consequences of the City's late attempt to raise *Monell*, and how prejudice and unfair surprise would result by allowing the belated assertion of the issue after the City had used its concession to secure the exclusion of Morro's witnesses. 926 F. Supp. 1040-41 [45(a)-46(a)]. Despite clearly being a primary basis of the District Court's ruling, the City did not challenge it on appeal. The City said nothing about estoppel, concessions, the pretrial order, whether the trial court abused its discretion in refusing to consider the belated contention, or why it should be allowed to benefit from the concealment of the issue at trial. (*See* Appendix A). Yet now the City urges this Court to accept its petition arguing that the Court of Appeals ruling implicates the high degree of importance essential to trigger the application of the United States Supreme Court's scarce resources. Had this issue occupied such a position of importance, it should have been timely raised below.

The failure to timely raise this challenge on appeal is fatal to the City's petition for writ of certiorari. Little justification for certiorari jurisdiction exists over a Court of Appeals determination of the discretionary ruling of a trial court. Where the argument is not made in the first instance to the Court of Appeals, the issue is dead. Even in the Petition, the City relegates its concession and the basis of the District Court's finding of estoppel to a footnote, and it wholly fails to mention that the District Court, in open court, excluded Morro's witnesses

because the City conceded that "under *Pembaur* and *Prapotnik* and *Jett* [the chief] was the City." 117 F.3d 512 [7a]. (*See* footnote 2, Petition p. 1). It also fails to mention that, or explain why, all of the issues it now argues were not timely raised and have never been briefed before in this case. The Suggestion for Rehearing, in which these issues first surfaced, was summarily rejected.

Rather than address an issue of importance to jurisprudence, the City wants relief from, or the benefit of, a strategic tactic it elected at the trial court level. Certiorari should be refused where the petitioner conceded an issue at trial, obtained a material benefit from the concession, was denied the opportunity to reverse its position because of demonstrated prejudice to its adversary, and failed to challenge the District Court's ruling on appeal. Despite the spin placed on the issues by the Petitioner, any review of this matter will ultimately devolve to whether the District Court abused its discretion in refusing to allow the City to reverse its position and escape the consequences of concessions it made as the issues were formulated and tried.

II.

THE DECISION BELOW IS NOTHING MORE THAN THE AFFIRMANCE OF A DISTRICT COURT'S DISCRETIONARY RULINGS RENDERED AS PART OF ITS ROLE IN FORMULATING ISSUES TO BE TRIED; AS SUCH, IT CARRIES NO WEIGHTY CONSIDERATIONS JUSTIFYING THE EXERCISE OF CERTIORARI JURISDICTION.

The decision of the Court of Appeals does not rest on constitutional principles nor is it one on which the different circuits disagree. It has, in effect, little precedential application because it involves appellate review of the discretionary decisions of the District Court rendered during the course of its management of the case.

The District Court, after presiding over two pretrial hearings and the trial of the case, during which it supervised the formulation of the issues, determined that the City had conceded the *Monell* issue. Whether characterized as an element of the plaintiff's claim or as an affirmative defense, any issue may be waived or conceded by either party. The comments to Rule 16 Fed. R. Civ. P. give guidance:

> Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived.

The Court of Appeals refused to interfere with the District Court's exercise of its discretion and affirmed.

Rather than hinging on the characterization of *Monell* limitation on municipal liability as a defense or an element of the plaintiff's claim, the decisions of the District Court and the Court of Appeals rest on the interpretation of the pretrial order and, more importantly in this case, the conduct of the City's trial counsel during the trial of the case. The *Monell* issue first surfaced at trial when Morro proffered three witnesses whose testimony would have proven custom and practice.[3] The City objected on the basis of relevancy prompting the District Court's inquiry to the City:

> Well, is it not conceded from the pre-trial, is my

3. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (n.10), 106 S. Ct. 1292, 1299, 89 L. Ed. 2d 452 (1996) holding:

> A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged action was pursuant to a state "custom or usage."

> recollection of this case that the City of Birmingham, as is true of most if not all municipalities, has as its decision maker ultimately with respect to police command decisions the chief, so that we're not talking about and the defendant is not attempting to distance itself from whatever it was that Chief Deutcsh did or didn't do that might or might not constitute a violation of a constitutional right of the plaintiff because under *Pembaur* and *Prapotnik* and *Jett* he was the City.
>
> The question then is not — and there's no requirement on the plaintiff in this case, is there, to prove that this man, the chief, did in fact exercise the authority in other instances, whether rightly or wrongly, that he exercised here? It's the City. He was the City. And I think the city concedes that.

117 F.3d at 512 [6a]. The Court of Appeals then noted:

> The City did not take its next available opportunity to correct the District Court's observation that it had conceded that the chief was the final policymaker. Instead, the City adhered to its relevancy objection despite the District Court's stated understanding that the objection was premised upon a concession of the chief's final policymaker status.

117 F.3d at 512 [7a].

The City did not voice disagreement in response to the District Court's observation because the City apparently agreed. For example, the City did not raise the *Monell* issue in its Rule 50 motion at the close of Morro's case nor at the close of all evidence; it submitted a jury instruction to the court at the

beginning of the charge conference which affirmatively charged the *Monell* issue out of the case. 117 F.3d at 512-13 [7a-8a]. Only when the charge conference was underway did the City reverse its position, withdraw its requested affirmative charge, and reopened argument on the Rule 50 motion by stating:

> There are a couple of other matters though, Your Honor —
>
> The Court: All right.
>
> [Counsel]: — that bother me greatly. *And I should have mentioned them before*, but I think now is the time to mention them.

[83a].

The Court of Appeals followed established authority giving the trial court discretion to effectively manage the cases before it, citing *Hodges v. United States*, 597 F.2d 1014 (5th Cir. 1979); *Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423 (11th Cir. 1993); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir. 1991); *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364 (11th Cir. 1988). By remaining silent in the face of a direct inquiry from the District Court, the City successfully prevented the introduction of evidence which would have firmly established the "custom and usage" method of demonstrating municipal liability. Having secured this tactical advantage, the City waited until after all evidence was in to maintain that Morro had failed to present sufficient evidence from which municipal liability could be established. It was well within the District Court's discretion to deny the City the benefit of what the Court of Appeals described as an "ambush". 117 F.3d at 511-12 [note 3, 6a]. It was manifestly appropriate for the Court of Appeals

to refuse to disturb this exercise of discretion; given the complete absence of any argument that the District Court had abused its discretion, erroneously treated *Monell* as a defense, misinterpreted its pretrial orders, or incorrectly applied the doctrines of waiver or estoppel, the Court of Appeals could have reached no other conclusion.

The Court of Appeals hesitancy to substitute itself for the District Court on matters related to the formulation of issues and the enforcement of pretrial orders is based on sound policy as well as precedent. The District Court presides over pretrial conferences where counsel meet face to face with the Court to crystallize the issues for trial. Trial courts routinely demand stipulations and concessions, and the obligation is on counsel to identify contested matters. Typically, a District Court will question counsel: "What are the contested issues?" The issue formulation process would be rendered ineffective if counsel were permitted to preserve all issues by responding: "General denial."

Here the District Court presided over two pretrial conferences attended by the same attorneys who tried the case. He saw and heard counsel for the City as the issues were formulated, and he confirmed at trial what appeared firmly understood when he stated: "He [Deutcsh] was the City. And I think the city concedes that." If the City believed that this implicated important burden of proof issues relating to the characterization of *Monell* as a defense or an element of the plaintiff's case, or that the District Court and Morro were mistaken about the issues being tried, why did it remain silent? The Court of Appeals refused to allow this "sort of ambush". 117 F.3d at 516 [note 3, 16a].

The only aspect of the Court of Appeals' decision relating to anything other than the review of discretionary decisions of

the District Court are references as to what its decision might be if it were presented with the final policymaker issue. The petitioner's remark to the effect that the Court of Appeals was "undoubtedly" correct regarding its prediction of the outcome of the case had the City not conceded the *Monell* issue jumps the gun. (*See* Petition, footnote 1, page 3.) First, the act of a final policymaker is not the only path to municipal liability; the City's liability would have also been established had Morro been permitted to present testimony reflecting the custom and practice of the City. *See* 117 F.3d at 516, n.3 [16a]. This evidence was excluded because the City conceded that its chief of police was the final policymaker for purposes of "*Pembaur, Paprotnik,* and *Jett*". 117 F.3d at 511-12 [6a]. Moreover, the City's concession of the final policymaker issue dispensed with the necessity or opportunity for the District Court (and the Court of Appeals) to determine on the basis of a complete record the liability of the City under either the final policymaker or custom and usage approach. There was simply no need for Morro to present evidence or argument about the role and meaningfulness of the Personnel Board review and whether, under state law, the decision of the chief of police satisfied *Monell*; the City had agreed that this was not an issue.

Nevertheless, it is noteworthy that the evidence demonstrated the absence of meaningful review available to protect Morro and those like him from retaliatory conduct from City policymakers. Evidence was adduced showing conduct by the official policymaker of the City over matters relating to police personnel activities that produced immediate adverse consequences to one exercising his First Amendment rights. The jury found that Morro's suspension was a result of Morro's exercise of his First Amendment rights and rejected as a pretext the "unpreparedness" charge. The Personnel Board review process did not and could not intercede and protect Morro from the mental anguish, humiliation and injury to his reputation he

suffered during the suspension period; it only has the power to rescind an order of suspension that had already been enforced and award back pay.

Much like judicial review, the Personnel Board is separate from the City and review is conducted after the fact. The suspension, being the final act of the City, was effective immediately and Morro served out the full term of his suspension without pay while the Personnel Board appeal process was conducted. The jury heard testimony of the mental anguish and lasting humiliation he suffered while under suspension and also, without objection, of the continuing adverse employment action Morro suffered for years after the suspension. 926 F. Supp. at 1036, 1042 [37a-38a, 48a]. The jury's award of $150,000, the amount of which has never been challenged, illustrates the severity of the injury not redressable by Personnel Board review. While some municipalities may have procedures that review adverse employment decisions before the consequences take effect thereby preventing injury, City employees have no such preventive remedy when faced with a decision of the final policymaker. The Personnel Board to which Morro appealed his suspension addresses such matters *post facto* and cannot enjoin or stay the policymaker's decision. But because the City conceded this issue, it was not litigated, and comments as to what "probably" would have been the outcome obviously rise only to the level of dictum, not an "undoubtedly" correct interpretation of a complex issue of constitutional law.

CONCLUSION

The first time the City raised the question now presented to the United States Supreme Court was in its Petition for Rehearing En Banc to the Court of Appeals. Neither the District Court nor the panel of the Court of Appeals were timely presented with the opportunity to address the arguments now raised to this Court. Moreover, the City has failed to demonstrate that the decision below rises to the level of importance making certiorari desirable; the decision will not impact future litigation except to make trial counsel more aware of the importance of issue formulation to the orderly management of a case. For these reasons, the writ should not issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — BRIEF OF CITY OF BIRMINGHAM (APPELLANT) TO THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO: 96-6445

SCOTT MORRO,

APPELLEE,

vs.

THE CITY OF BIRMINGHAM,

APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
CASE NUMBER: CV 92-AR-02339-S

BRIEF OF APPELLANT

* * *

CERTIFICATE OF INTERESTED PERSON AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following have an interest in the outcome of this case:

(a) Arrington, Richard Jr. — Mayor, City of Birmingham

(b) Bell, Roosevelt — Councillor, City of Birmingham

Appendix A

(c) Bell, William — Councillor, City of Birmingham

(d) Bentley, Thomas, III — Assistant City Attorney
Counsel for Appellant

(e) Blake, Dr. Jimmy — Councillor, City of Birmingham

(f) Blankenship, Eddie — Councillor, City of Birmingham

(g) City of Birmingham — Defendant/Appellant

(h) Acker, Jr., William M. Honorable — United States
District Judge

(i) Coleman, Linda — Councillor, City of Birmingham

(j) Daniel, Linda — member Jefferson County Personnel Board

(k) Davis, E. Byron — Councillor, City of Birmingham

(l) Edens, John M. — Assistant City Attorney
Counsel for Defendant/Appellant

(m) M. Clay Ragsdale — Counsel for Appellee

(n) Scott Morro — Plaintiff/Appellee

(o) Gunn, Aldrich — Councillor, City of Birmingham

(p) Jefferson County Personnel Board

(q) Johnson, James B. — member Jefferson County Personnel
Board

(r) Newton, Demetrius C. — City Attorney, City of Birmingham

(s) Payton, Ben — Executive Director Jefferson County Personnel Board

(t) Sewell, Patricia — Councillor, City of Birmingham

(u) Michael Fliegel — Assistant City Attorney
Counsel for Defendant/Appellant

ORAL ARGUMENT REQUESTED

Appellant requests oral argument in this appeal. Appellant believes that oral argument is necessary in this case although the Court has spoken numerous times on the dispositive issue in this case-qualified immunity. Appellant believes the decisional process will be aided by oral argument. This appeal is not frivolous and appellant does not believe that the court has decided a cases recently on these precise facts

* * *

CERTIFICATE OF TYPE SIZE AND STYLE

Appellant certifies that the size and style of type used in the main body of this brief is Courier 10cpi. The brief includes several appendices which are the same or different unknown type styles.

STATEMENT OF JURISDICTION

This is an appeal of a final decision of the United States District Court for the Northern District of Alabama, Southern Division. Jurisdiction of this appeal is based on 28 U.S.C. § 1291.

Appendix A

STATEMENT OF THE ISSUES

I. WHETHER THE DISCIPLINARY DECISIONS OF A CITY OF BIRMINGHAM POLICE CHIEF ARE FINAL DECISIONS WHICH MAY SUBJECT THE CITY TO LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES*

II. WHETHER THERE WAS INSUFFICIENT PROOF THAT MORRO SUFFERED A CONSTITUTIONAL DEPRIVATION.

III. WHETHER ADMITTING THE PERSONNEL BOARD HEARING OFFICER'S REPORT INTO EVIDENCE WAS REVERSIBLE ERROR

IV. WHETHER THE DISTRICT COURT ERRED REVERSIBLY IN REFUSING CITY'S REQUESTED INSTRUCTION ON § 1983 MUNICIPAL LIABILITY

V. WHETHER OR NOT SELECTION OF VENIRE FROM A HOLDOVER JURY POOL DISCRIMINATES OR VIOLATES THE EQUAL PROTECTION RIGHTS OF THE DEFENDANTS.

STATEMENT OF THE CASE

This case was initiated by the plaintiff's complaint filed October 2, 1992 which sought declaratory, injunctive and monetary relief from named defendants Arthur Deutcsh individually and in his capacity as chief of the City of Birmingham Police Department and the City of Birmingham. R1-1. Plaintiff invoked federal jurisdiction under 28 U.S.C.

§ 1343 seeking relief for an alleged constitutional rights violation through 42 U.S.C. § 1983. The complaint alleged that the defendants had violated plaintiff's constitutionally guaranteed right to free speech by punishing him for attending a public trial. R1-1-2.

On October 26, 1992 the defendants moved to dismiss the complaint on the ground that it was not supported by specific factual allegations. R1-5-1. Furthermore paragraph (3) of the motion to dismiss specifically pointed out the failure of plaintiff to allege that the City's liability was premised on an official policy, practice, or custom of the City of Birmingham as required by *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978), which case was specifically cited in the motion to dismiss. R1-5-2. On November 24, 1992 the District Court, Judge William A. Acker entered an order dismissing the complaint for vagueness but plaintiff was given leave therein to amend the complaint within 10 days. R1-7.

On December 17, 1992 plaintiff filed his amended complaint which included an attachment outlining the disciplinary charges which had been brought against him by the Chief and the City. R1-10. The amended complaint was answered by defendants on January 12, 1993. The amended complaint alleged that Deutcsh had acted to violate plaintiff's constitutional rights as a policy maker of the City of Birmingham. The defendants' answer to the complaint specifically denied the material averments of this allegation in the complaint. R1-11-2

The district court entered its scheduling order in this case on January 13, 1993. On April 20 1993 a pretrial conference was held which was attended by the court and counsel for all

parties. Pursuant to the conference the district court on April 20, 1993 issued a pretrial order. R1-17. Therein the plaintiff again asserted that defendant Deutcsh was a policy maker for the City of Birmingham. R1-17-2. The defendants once again denied each and every material allegation of the plaintiff's complaint. R1-17-2. In so doing the defendants denied that part of the complaint and the pretrial position of plaintiff which sought to establish the required allegation (and subsequent required proof) of a municipal policy or a decision by a municipal policy maker. The very same day the defendants filed a summary judgment motion which claimed that plaintiff failed to allege (and thereafter prove) a policy or practice of the City which could cause the City to be liable under 42 U.S.C. § 1983. R1-18-1. The motion also claimed that Deutcsh was entitled to judgment in his favor individually under principles of qualified immunity.

On April 21, 1993 the district court issued a Rule 56 submission order. R1-19. On August 20, 1993 the district court denied the defendants' motion for summary judgment, filing with the denial order a memorandum opinion. R2-50. Between April 21, and August 20, 1993 there were several orders entered by the district court related to discovery. These matters were referred to the United States Magistrate Judge, Paul W. Greene. The Magistrate Judge entered orders accordingly and these were complied with by the parties.

On August 24, 1993 Deutcsh through his counsel filed notice of an interlocutory appeal pursuant to 28 U.S.C. § 1292 to the United States Court of Appeal for the Eleventh Circuit as to the denial of the summary judgment insofar as it claimed that he was entitled to judgment in his favor based upon the defense of qualified immunity. R2-51. On October 19, 1994

the Court of Appeals reversed the district court's judgment on the qualified immunity issue, finding that the facts of plaintiff's lack of preparedness were undisputed and that it was objectively reasonable to discipline him. R2-55. On February 16, 1995 the district court issued an order pursuant to the Court of Appeals mandate dismissing Deutcsh from the case in his individual capacity. R2-56.

On February 27, 1995 the defendants filed a second motion for summary judgment based on the argument that the language of the Court of Appeals established as undisputed fact that Morro was unprepared for Court and that therefore no unconstitutional policy could be proven since it is not unconstitutional to discipline an employee for violation of reasonable employment rules. R2-57. On March 23, 1995 the district court denied the second summary judgment motion and entered a memorandum opinion that same date. R2-61. The district court cited in its order that *Owens v. Fulton County,* 877 F.2d 947 (11th Cir. 1984) and *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915 (1988), offered "legitimate ways around *Monell*" .

A second pretrial conference was held on April 5, 1995. A second pretrial order was entered by the district court on the same date. R2-63. In the new pretrial order Johnnie Johnson, Jr. was substituted as defendant in his official capacity as police chief for the retired Chief Deutcah. R2-63-2. Plaintiff adopted all of its positions as stated in its complaint. R2-63-2. Defendants again took the position of denying every material averment in the complaint. R2-63-2. This denial again went to the plaintiff's claim in paragraph 9 of his complaint that Deutcsh was a final policy maker sufficient to impose liability on the City for his actions in disciplining plaintiff.

Appendix A

On April 11, 1995 defendants moved the district court for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). R2-64. The district court granted the certification by order entered on April 12, 1995. On June 2, 1995 the Court of Appeals granted permission for the appeal. On July 25, 1995 clerk of the Court of Appeals notified all parties that this second appeal had been dismissed for failure to prosecute. R2-66 and R2-67.

The case was called to trial before Judge Acker and a jury on March 18, 1996. The jury drawn from this case were not members of the pool officially called to service for the week of trial beginning March 18, 1996 but were the remainders from the previous two weeks of service and consisted of eighteen white venirepersons. R2-80-19. Defendant's challenged the venire before selecting from it. R2-88. The district court denied the challenge to the jury venire as well as denying challenges to two jurors who indicated they had strong feelings apparently negative toward the defendants in this case. R2-88.

During the trial defendant's raised objections to the admission of evidence which were overruled by the district court. R3-88. Defendants objected to the admission of a memorandum submitted by a personnel board hearing officer on the grounds that its probative value was clearly outweighed by its potential for prejudice and misleading the jury. The defendants also attempted to put on direct evidence that the plaintiff intentionally made himself unavailable to testify in Judge Carole Smitherman's municipal courtroom in order to register a protest of the way she had decided a particular case. The district court refused to allow this witness to testify. R3-88. At the close of the plaintiff's case in chief and at the close of all the evidence defendants' counsel made motions for

judgment as a matter of law pursuant to Rule 50 of the F.R.Civ.P. R3-88- and R3-88- All of these were denied by the district court. R3-88 and R3-88-.

Defendant and plaintiff submitted requested jury charges. R2-75 and R2-76. Defendants' lead counsel withdrew its requested charge on municipal liability because it was inconsistent as written with the law which should have been applied in the case. Counsel instead asked the court to give a standard charge on municipal liability which the district court refused to do. R3-88-.

On March 20, 1996 the case was submitted to the jury after the district court's instructions. That same day the jury returned a verdict against the defendants in the amount of $150,000. R2-77. The district court on March 21, 1996 entered judgment on the jury verdict. Pursuant to the consent of all parties Chief Johnnie Johnson, in his official capacity as police chief, was dismissed from the action. R2-78.

On March 29, 1996 the City of Birmingham filed a renewed Rule 50 motion and for alternative relief therein requested a new trial. R2-80. The motion stated as grounds for relief, *inter alia,* that the plaintiff failed to establish that Chief Deutcsh was a policy maker whose edicts and decisions could impose liability on the City of Birmingham under *Monell, supra, Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 2d. 452 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed. 2d. 107 (1988); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida,* 971 F.2d 708 (11th Cir. 1992); *Hill v. Clifton,* 74 F.3d 1150, (11th Cir. 1996). Attached to the motion were appendices with copies of state law, the rules and

regulations of the Jefferson County Personnel Board and local ordinances. R2-80 (appendices). On April 12, 1996 the district court denied the renewed Rule 50 motion (R2-80) and filed that same date a memorandum opinion in support of its ruling. R2-83. On April 17, 1996 the district court filed an addendum to its April 12, 1996 opinion. R2-84.

On May 2, 1996 the City of Birmingham filed the instant appeal of the district court's denial of its renewed Rule 50 motion or its alternative requested relief of a new trial to the United States Court of Appeal for the Eleventh Circuit. R2-86.

STATEMENT OF FACTS

Scott Thomas Morro has been a City of Birmingham Police officer since 1986 (R3-88-106). From the beginning of his employment as a policeman he has always been assigned patrol duties. In 1990 Morro was assigned to the police department's South Precinct. He worked the 11:00 p.m. to 7:00 a.m. shift. Part of his patrol beat included the Kingston Housing Project.

On June 3, 1990 Morro, while patrolling the Kingston area, encountered a man named Moses Payne. Payne was a black man of very small stature. At the time of his encounter with Morro he was 25 years old and four feet and five inches tall. Morro placed Payne under arrest after he refused the officer's orders to stop being disorderly. In attempting to arrest Payne, Morro first exited his patrol vehicle and informed Payne he was under arrest. Morro then seized Payne's wrist which the arrestee tried to pull away. Although Morro could keep a grip on Payne he could not completely control him. Morro's arrest report noted that Payne struggle with him and attempted to flee. It also noted that the "officer restrained the def. until cuffs

could be placed on him." (plaintiff's exhibit 15) The report also indicated that Morro had to use force to affect the arrest.

Morro's patrol partner that night was a less experienced officer named Rodney Hall. During the same encounter Hall arrested a man named Benjamin Franklin. Both men were able to arrested by the lone officer listed on the arrest reports. In writing the two separate arrest reports the officers, Hall and Morro, cross-referenced the other defendant as an accomplice in the offense of the other. (Plaintiff's exhibits 15, and 16).

Both Morro and Hall testified that back-up had to be called during the arrests. The nature of the back-up was of the highest priority. The arrests were notable also in the fact that other citizens moved close to the officers as they attempted to effect the arrests. Indeed one reason Ben Franklin was arrested was because he seemed bent on interfering in the arrest of Moses Payne.

When the case against Moses Payne was called to court he plead guilty and was punished by the Municipal Court. Ben Franklin demanded a trial, making it necessary for the prosecutor, Patricia Burns to issue subpoenas to the witnessing officers. Since the arrests reports cross-referenced accomplices both Hall and Morro were subpoenaed to testify.

Prior to the date the Franklin prosecution was to take place the daughter of Mayor Richard Arrington, Jr., Erica Arrington, had been arrested in a July 4 celebration. The arresting officer, Jerry Bahakel, accused Ms. Arrington of several offenses including inciting a riot. Ms. Arrington accused him of false arrest and excessive force. Ms. Arrington's trial took place over the course of two days, a friday night and a rare Saturday session

of Birmingham Municipal Court. Her trial was presided over by the Hon. Carole Smitherman, municipal judge. This trial was widely attended by the press and interested citizens. Among those attending were a number of South Precinct officers who were there apparently to show their support for Officer Bahakel. Among the South Precinct officers attending was Scott Morro. Morro did not attend the entire trial but sat behind Erica Arrington from about 30 minutes to an hour before leaving the trial. He did not return for any later part of the trial either that first night or the next day.

After the two day trial Judge Smitherman found Erica Arrington not guilty of all the charges against her. There was no Sunday session of municipal court and the very next court docket for Judge Smitherman was that Monday and it included the Ben Franklin case, in which Morro was a subpoenaed witness.

On the day of the Franklin trial, Prosecutor Burns sought to interview Morro in preparation for trial. Morro indicated that he could not remember anything about the arrest of Ben Franklin. Moses Payne and Franklin were seated in the municipal court together. Prosecutor Burns asked Morro to look into the courtroom to see if he recognized anyone. He indicated that he could not. After concluding from the information given her by Morro, that he could be of no assistance in the prosecution, Burns dismissed Morro. Officer Hall was also subpoenaed and provided the testimony necessary to gain Franklin's conviction in municipal court.

For some period after the Arrington acquittal Judge Smitherman noticed that there were increasing instances of forgetfulness and in attendance among the officers who were

called to testify in her court about arrests they had made. R3-88-355.

Judge Smitherman also testified that Morro was an officer who fairly frequently testified in her courtroom and who prior to the Erica Arrington trial had excellent recall, testifying without notes and exhibiting excellent memory. R3-88-356. Indeed, a review of this matter submitted to Morro and his counsel by the City attorneys showed that being unprepared is highly unusual for City of Birmingham officers. No officers other than Morro and Lockhart were ever complained of, investigated or disciplined for being unprepared for court. Plaintiff's exhibit No.13.

Judge Smitherman became so concerned about this phenomenon that she required one officer Betty Lockhart, to testify under oath that she could not remember the facts of a DUI arrest that included an accident and which occurred only a short time before the officer was called upon to testify. Later on Judge Smitherman complained to the police department about the drop in attendance and participation among officers subpoenaed to her court. She also gave statements to the internal affairs division of the department regarding the situation.

The internal division assigned Lt. Lee Ann Self to investigate the complaints from the municipal court. She interviewed a number of persons including Morro, Judge Smitherman, Prosecutor Burns and Rodney Hall. After her investigation, which included probing into the question of whether the drop off in participation was an intentional response or protest of Judge Smitherman's ruling in Erica Arrington's favor, she recommended that Morro be disciplined for a violation of departmental rules. Morro was not charged with anything but being unprepared for court. Morro's lack of preparation violated existing rules of the police department.

Appendix A

A hearing was held for Morro on the charges internal affairs had recommended against him. It was presided over by Deutcsh and participated in by his deputy chiefs. According to Chief Johnnie Johnson, who was then a deputy chief, the facts and issues at the hearing were discussed among the officials there and they made recommendations to Chief Deutcsh. Johnson testified that he was in agreement with the conclusion reached by internal affairs that Morro was unprepared for court. R3-88-424.

Johnson also provided testimony on the appeal process in place for disciplinary actions involving City of Birmingham police officers and other employees. Any decision on discipline made by a department head is appealable to the Mayor of the City of Birmingham. If the discipline imposed exceeds a five day suspension the employee is entitled to appeal the case to the Jefferson County Personnel Board. Johnson testified that the Personnel Board can and often does countermand the decisions made by the City of Birmingham police chief. R3-88-419.

After the hearing at the City Chief Deutcsh imposed discipline of a 30 day suspension on Morro. Morro exercised his right to appeal the decision of Chief Deutcsh. This right of appeal of the decision of Chief Deutcah was established by the law of the State of Alabama and by the rules and regulations of the Jefferson County Personnel Board. The Personnel Board assigned a hearing officer, attorney Ann Arnold, to hear the case against Morro. After hearing all the evidence she recommended to the board that the discipline against Morro be rescinded, apparently concluding that he was not unprepared for court as charged by the internal affairs division. Her conclusions from the evidence were made in a report to the

Personnel Board which was admitted into evidence over the City's objection. Plaintiff's exhibit No. 10. Upon her recommendation the Personnel Board took the action of rescinding the discipline that had been decided upon by Chief Deutcsh and Morro was reinstated with backpay for the time he had been suspended.

After his reinstatement, Morro returned to work in the South Precinct. He was under the command of Lt. Self who had left internal affairs to become a shift commander at South Precinct. Morro testified at trial that he continued to be harassed. His only proof of this however was his subjective interpretations of the assignments and instructions he was given by superiors with whom he disagreed with.

Prior to the Erica Arrington and Franklin trials there had been accusations against the Chief of Police, Arthur Deutcah, that he had tampered with or ordered the alteration of Erica Arrington's arrest records. In response to these accusations Chief Deutcsh on July 9, 1990 issued a memorandum explaining his version of the facts to members of the department. Morro was permitted to enter this memorandum into evidence as plaintiff's exhibit one over the objection of the defendants. Plaintiff's Exhibit No. 1.

During the trial of this case, a witness notified Lt. Self that he had heard Morro state that he would not testify in Judge Smitherman's courtroom because she did not believe the testimony of police officers. This statement was made contemporaneously with the judge's acquittal of Erica Arrington and the subsequent drop off in attendance of her court by subpoenaed police officers. When counsel for the City found out about the witness they notified the Court and counsel for

Morro. The City sought to introduce the testimony of this witness, officer John Crane, but were denied the opportunity to do so by the Court. R3-88-379.

SUMMARY OF ARGUMENT

Morro failed to adduce evidence in the district court that the deprivation he claimed the City was liable for was caused or occurred pursuant to a municipal policy as required for the imposition of municipal liability by *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030 (11th Cir. 1987). In particular, the evidence clearly, precisely and without controversy showed that former Birmingham Police Chief Arthur Deutcsh was not and could not, as a matter of law, be found to be a policy maker for the City of Birmingham on disciplinary matters under the holdings of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama and the law of the State of Alabama which those holdings aforementioned require the Court to look to in determining who is a policy maker (including any local ordinances or regulations which are applicable. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir. 1992); *Hill v. Clifton*, 74 F.3d 1150. The evidence in this case clearly, precisely and without controversy showed that the personnel disciplinary decisions of the Chief of the Birmingham Police Department (both Chief Deutcsh and Chief Johnson) were subject to review by the Jefferson County Personnel Board and in some cases by the Mayor of the City of Birmingham.

Appendix A

Morro adduced no substantial evidence from which a reasonable jury could find that any violation or deprivation of his First Amendment rights occurred. If Chief Deutcsh punished only those officers who have been clearly demonstrated to have broken departmental rules and regulations for which they were clearly subject to discipline and to have punished no other officers there is no support for an inference by a reasonable jury that Deutcsh punished Morro for his association with or support of another officer. Since Morro was clearly unprepared and such lack of preparation is a violation of rules he cannot state that he was being punished for associating with or supporting another officer. This is particularly compelling given that no other officers who attended the trial were punished. And the only ones punished were those who had violated trial preparation rules. The only reasonable inference to be drawn from this scenario is that officers who violate court preparation rules will be punished. There was no evidence available to support an inference that officers will be punished for violating court preparation rules only if they support persons unpopular with the administration. This is so in part because no one else was ever accused of failing to prepared for courtroom participation in a case for which they made the arrest and were under subpoena.

The system employed by the Northern District of Alabama for empaneling juries violates the Jury Selection and Service Act, 28 U.S.C. § 1861, *et seq.* by causing the systematic underrepresentation of African-Americans in its venires. The selection of the jury venire in the instant case from the remaining available jurors on the March 4, 1996 Jury List rather than the larger (and usual) March 18, 1996 Jury List operated to cause absolutely no representation of African-Americans on the venire from which the Jury in the instant case was selected.

The City was substantially prejudiced by the district court's ruling admitting into evidence the report of the hearing officer. Although arguably relevant, the report's admission in its entirety resulted in unfair prejudice, confusion of issues (the issue was what was reasonable for Deutcsh, not what Ann Arnold thought about the evidence when she heard it) and misleading the jury (who may have thought that Ann Arnold's findings conclusively showed that Deutcsh could have had no reasonable basis and proper motive in disciplining the plaintiff). Federal Rules of Evidence, Rule 403.

The City was substantially and unfairly prejudiced by the failure of the district court to instruct the Jury on the basis of municipal liability under 42 U.S.C. § 1983. The district court's instructions to the Jury seem to indicate that the basis of municipal liability is the legal doctrine of *respondeat superior,* this doctrine cannot be the basis of municipal liability in a § 1983 case. *Jett v. Dallas Independent School District,* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

ARGUMENT

I. WHETHER THE DISCIPLINARY DECISIONS OF A CITY OF BIRMINGHAM POLICE CHIEF ARE FINAL DECISIONS WHICH MAY SUBJECT THE CITY TO LIABILITY UNDER *MONELL v. DEPARTMENT OF SOCIAL SERVICES*

Plaintiff failed to adduce evidence that the deprivation he claimed the City was liable for was caused or occurred pursuant to a municipal policy as required for the imposition of municipal liability by *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Sideman v. Shallowford Community Hospital, Inc.,*

826 F.2d 1030 (11th Cir. 1987). In particular, the evidence clearly, precisely and without controversy showed that former Birmingham Police Chief Arthur Deutcah was not and could not, as a matter of law, be found to be a policy maker for the City of Birmingham on disciplinary matters under the holdings of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Alabama and the law of the State of Alabama which those holdings aforementioned require the Court to look to in determining who is a policy maker (including any local ordinances or regulations which are applicable. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Martinez v. City of Opa-Locka, Florida,* 971 F.2d 708 (11th Cir. 1992); *Hill v. Clifton,* 74 F.3d 1150, (11th Cir. 1996); See Appendices containing Act No.248, H.580, of the Alabama Legislature of 1945 p. 376 as amended (the Jefferson County Personnel Board Enabling Act), The Jefferson County Personnel Board Rules and Regulations, Act No. 452 of the Alabama Legislature of 1955, as amended (excerpts from the Mayor-Council Act- establishing the form of government adopted by the citizens of the City of Birmingham), Supplemental Personnel Rules and regulations adopted by the City of Birmingham.

The evidence in the district court clearly, precisely and without controversy showed that the personnel disciplinary decisions of the Chief of the Birmingham Police Department (both Chief Deutcsh and Chief Johnson) were subject to review by the Jefferson County Personnel Board and in some cases by the Mayor of the City of Birmingham.

Appendix A

In *Monell v. Department of Social Services, supra,* the United States Supreme court held that section 1983 liability may not be based upon *respondeat superior* theory alone. This holding was reaffirmed in *Jett v. Dallas Independent School District,* 491 U.S. 701, 736 (1989). These Court rulings hold that municipalities are liable only when the alleged constitutional violations result from the official policies and well-settled customs of the municipalities. These holdings are in part based on the notion that municipal governments can act only through natural persons. The governments should only be held responsible when, and only when, their official policies caused their employees to violate the plaintiff's constitutional rights. The vicarious liability implicit in the *respondeat superior* doctrine is inconsistent with the causation requirement implicit in the language and legislative history of 42 U.S.C. section 1983. Thus the statement often quoted from *Monell*:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edict or acts *may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under Section 1983.

Monell, 436 U.S. at 694. (emphasis in original)

Since the decision in *Monell,* the Supreme court has ruled in a several cases that municipal liability under § 1983 can arise from a single decision taken by municipal officers responsible for setting policy in a precise area of the government's activities. *See Praprotnik,* 485 U.S. at 123; *Pembaur,* 475 U.S. at 480 (1986). In *Pembaur* the Court found municipal liability for the violation of the plaintiff's Fourth Amendment rights where deputy sheriffs unlawfully entered the plaintiff's office on the

express instructions of the county prosecutor. The Eleventh Circuit analyzed *Pembaur's* impact in the municipal or governmental liability area in section 1983 litigation in *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991),

> In *Pembaur,* the Court articulated the following three-part test for determining when a single act of a municipal officer subjects the municipality to liability under section 1983: (1) acts which the municipality officially sanctioned or ordered; (2) acts of municipal officers with *final policy-making authority as defined by state law*; and (3) actions taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area. *Pembaur,* 475 U.S. at 480-3 & n.12, 106 S.Ct. at 1298-1300 & n. 12. The Court also clarified the fact that a *municipality is not liable merely because the official who inflicted the constitutional injury had the final authority to act on its behalf.* Thus the Court states:
>
> [W]e hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to section 1983 liability. Municipal liability attaches *only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered.* The fact that a particular official- even a policy making official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. *See, e.g. Oklahoma v. Tuttle,* 471 U.S. [808] at 822-24 105 S.Ct, [2427] at 2435-2436 [85

> L.Ed.2d 791 (1985)]. The official *must also be responsible for establishing final government policy respecting such* activity before the municipality can be held liable.
>
> *Pembaur,* 475 U.S. at 481-82, 106 S.Ct. at 1299-1300. *See also City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Jett v. Dallas Independent School Dist.* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989). (emphasis added).

Manor Healthcare, 929 F.2d at 637.

In *Praprotnik,* the Court further clarified when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. There the Court held that the municipality could not be held liable for the unconstitutional transfer of a city employee where the officials who arranged for the transfer did not possess final policy making authority with respect to employment decisions and had not been delegated such authority. The Eleventh Circuit in following *Praprotnik's* conclusions in the case of *Mandel v. Doe,* 888 F.2d 783 (11th Cir. 1989) articulated the former's conclusions as follows:

> The Court concluded that the mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policy making authority. Rather, the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies *and are not subject to review. Praprotnik,* 485 U.S. at 125-28 (Emphasis added).

Mandel, 888 F.2d at 792.

Appendix A

The *Praprotnik* plurality stated that a policy maker's review of a subordinate's decisions does not reflect municipal policy maker's review of a subordinate's decisions does not reflect municipal policy and thereby create municipal liability.

> Simply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make police.
>
> * * *
>
> It would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policy maker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official. But the failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority . . .

Praprotnik 485 U.S. at 130.

The *Praprotnik* plurality also reached the important conclusion that whether a particular official has "final policymaking authority" is a question of state law. *Praprotnik*, 485 U.S. at 124.

Appendix A

> "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority *is a question of state law.* (Emphasis added).

Id. at 124 (quoting *Pembaur,* 475 U.S. at 483).

In *Jett v. Dallas Independent School District,* 491 U. S. 701 (1989), a majority of the Supreme Court adopted the *Praprotnik* plurality's view that identification of the official or final policy maker is a question of state law.

> [T]he identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well " 'custom or usage' having the force of law," *Praprotnik, supra,* at 124 n. 1, 108 S. Ct., at 924, n. 1, the trial judge must identify those officials, or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have cause the deprivation of rights at issue by policies which affirmatively command that it occur, *see Monell,* 436 U. S., at 661, n. 2, 98

> S. Ct., at 2020, n. 2, or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity. *See Pembaur, supra,* at 485-487, 106 S. Ct., at 1301-1302 WHITE, J. concurring).

Jett, 491 U. S. at 737.

In *Manor Health,* the Eleventh Circuit held a city could not be held liable under § 1983 for the mayor's alleged bribery and extortion in connection with a zoning matter, as the mayor was not the ultimate policymaking authority regarding zoning issues, and the city neither adopted nor ratified his bribery and extortion. *Manor Health,* 929 F. 2d at 636-38. The court concluded that under city charter, granting the mayor the power to oversee and administer all departments and agencies of the city, including the planning and zoning departments, the city council was granted the power to override the mayor's veto with regard to zoning matters. *supra.* at 637. Therefore, the mayor was not the ultimate policymaking authority regarding zoning issues. The court further concluded that the city did not develop a custom or practice which allowed the mayor to function without any supervision or review regarding zoning.

The City contends that there was no municipal policy or custom which deprived plaintiff of any constitutional right. The City contends that pursuant to *Rules and Regulations — The Personnel Board of Jefferson County* ("*Rules and Regulations*") (appendix) the Personnel Board, not the Mayor or the police chief, has final policy making authority with regard to adverse personnel actions taken against City employees. Nor did Morro demonstrate a custom or practice of the City whereby the City has taken adverse employment actions against persons similarly situated to him.

Appendix A

It is undisputed that the *Rules and Regulations* provide an extensive review and appeals procedure for disciplinary actions taken against "classified employees." Police officers of the City of Birmingham are in the "classified service" and are, therefore, covered by the *Rules and Regulations*. (See rules 1.10(a),(b)). Rule 6 provides:

> 6.1 DISCIPLINARY POLICY . . . A permanent employee may be dismissed, demoted, or suspended for cause or for any other reason deemed to be in the best interest of the public service and shall have the right of appeal as set forth in the following provisions.
>
> 6.5 APPEAL An employee with permanent status shall have the right appeal disciplinary action of dismissal, demotion, or suspension . . .
>
> 6.6 HEARING. The board shall order a public hearing of such charges. The hearing shall be for the purpose of determining whether or not the employee, by reason of his act or acts as charged and his record of service, merits retention in the service or should be removed therefrom or otherwise disciplined . . . The hearing may be before the Board or a Hearing Officer appointed by the Board. . . . If the Personnel Board hears such charges, it shall make its own opinion and decision.
>
> 6.8 DECISION . . . The board may rescind, modify or increase the penalty imposed by the appointing authority as warranted by the facts adduced at the hearing.

Appendix A

> 6.12 JUDICIAL REVIEW. The decision of the Board based upon all proceedings before the Board shall be final, subject to appeal by either party to the Circuit Court to review questions of law and the question of whether or not the decision or order of the Board is supported a substantial and legal evidence.

Rules and Regulations. The City also points the court to Rule 10.1 of the *Rules and Regulations* which the City contends sets forth the Board's policy with respect to employment with the City.

> 10.1 ACTIVITIES PROHIBITED. No person shall be appointed or promoted to, or dismissed from any position, or in any way favored or discriminated against with respect to employment because of his sex, political or religious opinions or affiliations, or his race.

The evidence suggests that Chief Deutcah was the official who made the initial decisions as to dismissal, demotion and suspension of police officers. The disciplined police officer may then appeal Chief Deutcah's decision first to Mayor Arrington, and then to the Personnel Board pursuant to Rule 6. (City Supplemental Personnel Rules, appendix). The facts are undisputed that plaintiff did appeal his suspension or termination to the Personnel Board.

There is no support for the district court's conclusion that Deutcsh is the final policy maker for the City with regard to police department personnel and disciplinary decisions. A proper consideration of state law and the applicable *Rules and*

Regulations, as well as the custom and practices of the City, lead to the conclusion that the Jefferson County Personnel Board is the final policymaker with regard to these decisions. First of all, Rule 6 of the *Rules and Regulations* clearly states that decisions of Deutcsh are reviewable by the Board. *Praprotnik, Worsham,* and *Manor Health* all held that a city official is not the final policymaker when that official's decisions are subject to review procedures. *See also Payung v. Williamson,* 747 F. Supp. 705, 708-09 (M.D.Ga. 1990) (Mayor was not the final policymaker for city in connection with personnel matters because all of mayor's employment decisions were subject to review by entire city council. As opposed to *Worsham, Manor Health and Payung* in which the City Council reviewed personnel decision, *Praprotnik* involved a reviewing body most analogous to the Jefferson County personnel Board, the reviewing body in *Praprotnik* was an *independent, non-internal* Civil Service Commission empowered to review and correct improper personnel actions. The Commission was created pursuant to the St. Louis City Charter. *Praprotnik,* 485 U. S. at 130. The Supreme Court in *Jett* stated that the final policymaker may be identified in either state or local law. *Jett,* 491 U. S. at 737. There is no evidence in this case proving that the Board's review is ineffective and meaningless. In fact the Personnel Board reversed Deutcsh's decision and reinstated the plaintiff with back pay for the period he was suspended.

II. WHETHER THERE WAS INSUFFICIENT PROOF THAT PLAINTIFF SUFFERED A CONSTITUTIONAL DEPRIVATION.

Obviously, there is a clearly established constitutional right to attend a public trial. An off-duty police officer may attend such, on his personal time when his attendance does not conflict

with his duties. This was also shown to be the City's policy. Morro did not prove that the disciplinary action taken against him was in retaliation for his exercise of his First Amendment right to attend a public trial. Morro did not prove that his exercise of this protected right was a motivating factor at all. Morro alleged that his discipline for his admitted unpreparedness was a "pretext". Morro's proof consisted of the chronology of events, from the arrest of the Mayor's daughter, his short-lasting attendance at her trial, his then admittedly (albeit, grudgingly) being unprepared for the trial of one (1) of the two earlier-arrested defendants, the investigation of his conduct of being unprepared and his subsequent suspension. Morro proved only that he attended a public trial and he was disciplined thereafter. However, the City proved that the discipline came following an investigation of Morro's being unprepared for a later trial before the same judge who acquitted the Mayor's daughter. That decision was not well-received by Morro.

Morro's proof is merely his subjective opinion that the discipline was pretext. Morro offered, as direct evidence of proof of retaliation, a letter the City's counsel submitted relating to a "poll" of Birmingham Police Department commands as to whether anyone else had been disciplined for "unpreparedness". Plaintiff's Exhibit No. 1. This exhibit does not offer any proof of retaliation or proof of a pretext for same. Morro's opinion also does not provide any help in determining the issue, let alone evidence. The City offered consistent and substantial legal evidence that the discipline was due to Morro's memory problem, not retaliation.

Morro's suspension occurred following an investigation of a similar, but later incident with the same judge, not involving Morro. Officer Betty Lockhart exhibited a similar unexplained

"memory loss" during another trial before Judge Smitherman. Morro's name came up as a possible prior case. During the internal investigation of Morro, it was proved to the reasonable satisfaction of the investigator and Deutcsh that Morro was at least unprepared for court. Indeed, the City's evidence possibly showed that Morro was retaliating against the City Judge, not Deutcsh or the City against him. The issue being in doubt, Morro was not charged nor disciplined for it.

Morro failed to prove a "causal connection" that his attendance at the trial resulted in his suspension. All that Morro proved was that his suspension occurred after the date attended the trial; that he was unprepared to assist in a different trial; and that one (1) other Police Officer had been disciplined for similar conduct. The "direct evidence" of retaliation comes only from Morro's strained interpretation of counsel's letter to the trial judge. No others had ever been complained-of, so no others were ever investigated or disciplined. This does not establish proof of a constitutional violation against Morro. Morro offered no proof that the City or Deutcsh unlawfully considered his attendance at the trial of the Mayor's daughter.

Morro does not have a constitutional right to avoid a properly-motivated investigation for being unprepared to perform his job. *Burns v. Reed,* 111 S.Ct. 1934 (1991). There was no evidence that the investigation commenced due to Morro's attendance at the trial. There was also no evidence that any later shift-assignment, supervision, evaluations or other personnel actions (including referring plaintiff to a psychiatrist) was commenced or motivated due to Morro's attendance at the trial, or for any other unlawful reason. Morro does not have a constitutional right to avoid discipline for being unprepared to perform his job. Part of Morro's duties include recalling and

truthfully testifying to the details of an arrest incident. Such a constitutional right does not exist, nor is it so "clearly established" that the defendants could be found liable were they to be in violation.

A government official may act within the realm of his discretionary authority. *Rich v. Dollar,* 841 F.2d 1558 (11th Cir. 1988). In granting Deutcsh qualified immunity for his "official" acts, the 11th Circuit found that Deutcsh had the discretionary authority to discipline Morro for being "unprepared for court". This Court ruled that as the evidence arguably showed Morro was in fact unprepared, Deutcsh was "objectively reasonable" in deciding to discipline him. *Morro v. City, et al.* (docket number 93-6738, 11th Cir., 5/15/95 opinion). Morro appears to believe that the fact that the Personnel Board disagreed with the City that his conduct merited a 30-day suspension is proof of the existence of constitutional violation. Morro may wish that is the state of the law, but it is not. If the law is unclear at the time the cause of action arose or if a reasonable officer could have believed his actions were lawful in light of clearly established law and the information he possessed, he is not liable. *McDaniel v. Woodward,* 886 F.2d 311 (11th Cir. 1989); *James v. City of Douglas, Ga.*, 941 F.2d 1539 (11th Cir. 1991). There is no "bright line standard" to evaluate when discipline violates clearly established constitutional rights. *Dartland v. Metropolitan Dade County,* 866 F.2d 1321 (11th Cir. 1989). If Morro's position is upheld, then one may avoid deserved-discipline merely by exercising some constitutional right prior to the date of the disciplinary action. Supervisors will be incapable of issuing discipline, or conducting investigations of rules infractions. The law does not support such a conclusion. Supervisors merely have to be reasonable, not right in their personnel decisions.

Appendix A

III. ADMITTING THE PERSONNEL BOARD HEARING OFFICER'S REPORT INTO EVIDENCE WAS REVERSIBLE ERROR.

The District Judge admitted, over defendants' objections, the Report of the Personnel Board Hearing Officer. Plaintiff's exhibit number 10. This report contains-the reasons the *Hearing Officer* found to support her recommendation to rescind Morro's 30-day disciplinary suspension. The report is merely a recommendation and the Personnel Board is not bound by this recommendation, nor the reasons given supporting such. In this case, the Personnel Board did adopt the recommendation to rescind Morro's suspension. However, there is no proof that it also adopted the Hearing Officer's rationale. Assuming arguendo, as there was no evidence that such was the case, the Personnel Board accepted the Hearing Officer's rationale, still nothing relevant is proven thereby. All that is proven is that both the Hearing Officer and Personnel Board disagreed with the defendants' decision to discipline Morro. Placing the report into evidence allows the jury to decide by speculation not evidence, that an unlawful reason existed for the disciplinary action and thus generated the rescission of the suspension.

A supervisor need not be completely right. A supervisor is even allowed to be completely wrong. For purposes of this lawsuit however, it must be proven further that the supervisor's wrong decision was based on a violation of Morro's "clearly established statutory or constitutional rights of which a reasonable person would have known". *Anderson v. Creighton,* 483 U.S. 635 (1987); *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991). This exhibit does not prove, nor does it tend to prove, anything other than that the Hearing Officer and Personnel Board disagreed with Deutcsh's decision and

overturned it. There is no ruling that they found Deutcsh motivated by an unconstitutional reason. Admitting this exhibit into evidence allows the jury to unfairly speculate that the Personnel Board's disagreement with Deutcsh's decision to discipline equates with such proof.

IV. WHETHER THE DISTRICT COURT ERRED REVERSIBLY IN REFUSING CITY'S REQUESTED INSTRUCTION ON § 1983 MUNICIPAL LIABILITY

Jury instructions are intended to give jurors an understanding of the law so that they can properly discharge their duty as finders of fact.

In this the City objected to the jury instructions given by the court on record before the jury retired, Pursuant to Federal Rules of Civil Procedure Rule 51, stating that the court failed to give a general 1983 liability standard for municipalities as a result of a policy and that the constitutional deprivation has to be caused by the policy and that the policy has to be set forth by a policymaker.

In *Praprotnik v. St. Louis,* 108 S.Ct. 915 (1988), it is stated that the Civil Service Commission had final decision making authority regarding employee termination and transfers, while the agency heads at most were entrusted with the authority for making discretionary personnel decisions in their departments. In this case Justice O'Connor stated that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself."

Appendix A

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), it is stressed that not every decision by municipal officers subjects municipalities to § 1983 liability. Rather municipal liability attaches only where the decisionmaker posses final authority to establish municipal policy with respect to the action ordered. Mere authority to exercise discretion is not enough.

Monell v. Department of Social Services, 436 U.S. 658 (1978), states that once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur.

In Federal Jury Practice and Instructions Vol.3 §103.11, it gives an example of instructions on a liability standard for municipalities which states as follows:

> Plaintiff claims that the city of ____, a municipality, is liable to him for the constitutional deprivation that he alleges. You are instructed that the city of ____ may be liable where you find that plaintiff has been deprived of his constitutional rights and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision. When the plaintiff is injured as a result of a government's policy, custom, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the city itself is responsible for the injury that it caused.

A failure to give explicit instructions to the jury regarding municipal liability and constitutional deprivation deprives the

jury of their duty as finders of fact. It is clear that there was no municipal policy or custom which deprived plaintiff of any constitutional right. Pursuant to the Rules and Regulations of the Jefferson County Personnel Board final policymaking authority with regard to adverse personnel actions taken against city employees are exclusively the decisions of the Jefferson County Personnel Board and not the Mayor nor the Police Chief.

V. WHETHER OR NOT SELECTION OF VENIRE FROM A HOLDOVER JURY POOL DISCRIMINATES OR VIOLATES THE EQUAL PROTECTION RIGHTS OF THE DEFENDANTS.

In Jury selection the controlling case is *Batson v. Kentucky,* 106 S.Ct 1712 (1986), and its progeny. Racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial jury intended to secure. In this case the court allowed the venire to consist of whites only selected from a jury wheel empaneled on March 4, 1996, which had served its two week term as jurors, and a new pool of jurors empaneled on March 18, 1996 was available to select a venire from.

The City, as a defendant, has the right to be tried by a jury whose members are selected pursuant to non discriminatory criteria. *Martin v. Texas,* 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906). The criteria employed by the court in itself is facially nondiscriminatory, however, the deviation from the criteria allowing a holdover venire when a fresh pool of jurors is available, and the holdover venire lacked the racial diversity of the community, is suspect. The City concedes that statically it is possible for it to receive an all white venire. The probability of receiving an all white petit jury is exponentially

increased when the pool has undergone several petit jury selections and the African-American representation has diminished due to their selection for petit juries. There can be no representation without representatives.

EQUAL PROTECTION

To establish an equal protection violation in the jury selection context, a defendant must show:

(1) That he or she is a member of a group capable of being singled out for discriminatory treatment.

(2) That members of this group were substantially under-represented on the venire.

(3) That the venire was selected under a practice providing an opportunity for discrimination. *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

Although the prima facie case for an equal protection claim resembles the elements of a fair cross section claim, the purpose of an equal protection claim is to determine whether the disparity in the jury venire is the result of a discriminatory purpose. Whereas the inquiry in a fair cross section claim focuses on the representativeness of the jury venire, the focus of an equal protection claim is whether members of a discrete group have been intentionally denied the opportunity to serve on a jury.

According to the 1990 U.S. Census Data the defendant, "The City", has a total population of 265,968. Out of the total population, 165,277 (63%) are African-American, 95,655 (36%) are white, and 2,036 (1%) are of other race. Whether at

common law or under the statutory law of jury selection it is agreeded that juries are to be drawn form a cross section of the community. The term "community" was defined in *U.S. v. Grisham*, 63 F.3d 1074 (11th Cir. 1995) in which is expounded that neither the language of the vicinage provision nor is legislative history suggest the geographical area from which the jury is summoned must be smaller than the judicial district created by Congress. Accordingly, the district court did not err in concluding that, in this case, the relevant statistical community was the Northern District rather that the Southern Division. Mapping the language onto the Northern District it is proper to say that the Jury Pool is the Northern District. With the majority of the City's citizens being African-American it is reasonable for the court to conclude that the City is predominately African-American, is a member of a group capable of being singled out for discriminatory treatment.

The City racial makeup was substantially underrepresented in the venire. The relevant statistical community is the Northern District. The Northern district is divided into seven Statutory divisions. 28 U.S.C. § 81(a). Pursuant to the plans, which were adopted by all of the judges of the United Stated District Court for the Northern District and approved by a panel of the judicial council of the United States Court of Appeals for the Eleventh Circuit, the district courts selects juries on a district-wide basis, as opposed to a division-wide basis. The percentage of percentage of population of Northern district eligible for jury service that is African-American is about 18%. The percentage of African-Americans on the venire was 0%. If the absolute disparity between the two percentages is 10 percent or less, the second element is not satisfied. *United States v. Rodriguez*, 776 F.2d 1509, (11th Cir. 1985). In the instant case the difference is approximately 18 percent which far exceeded the 10 percent

minimal set out in *Rodriguez*. The substantial underrepresentation on the venire alone is probable through statistical calculation but when coupled with the problem inherent in using a holdover venire amounts to stacking the deck against the City assuring that African-American participation on venire is minimal at best violated Equal Protection under the Fourteenth Amendment. Conclusively, there can be no representation when there are no representatives.

The final element that must be proved whether the venire was selected under a practice providing an opportunity for discrimination. The venire was empaneled on March 4, 1996. The defendant trial started on March 18, 1996, at which time a fresh panel of jurors was available to select from. The venire use had been available for previous trials over its two week tenure. Several petit jury were selected from the venire diminishing the representation of African-Americans on the venire. When the holdover venire reached the defendant trial the African-American representation was zero. No African-Americans were on the venire. The practice of discretionally using "holdover" venire when a fresh pool is available provides an opportunity for discrimination. A court knowingly using a holdover venire, knowing that the African-American representation was likely diminished, knew or should have known that its practice provided an opportunity for discrimination.

The City's motion to strike the venire should have been granted. The Equal protection Clause of the Fourteenth Amendment focuses on whether members of a discrete group have been intentionally denied the opportunity to serve on a jury. Using a holdover venire which is not composed of members of a group have been singled out for discriminatory treatment,

that members of the group were substantially underrepresented and the venire was selected under a practice providing an opportunity for discriminating make out a prima facie case and establishes an Equal Protection violation.

CONCLUSION

Because the district court should have found that the decision of Chief Deutcsh in disciplining Morro was not a final decision of the City of Birmingham and under the law of the State of Alabama was subject to meaningful review on appeal to the Jefferson County Personnel Board, thereby affording no basis for the imposition of municipal liability under *Monell v. Department of Social Services,* its judgment is due to be reversed and the district court ordered to enter judgment in favor of the City of Birmingham. The City is alternatively entitled to judgment because Morro failed to establish by substantial evidence any constitutional injury or deprivation for which he was entitled to relief.

Alternatively, the City of Birmingham is entitled to a new trial because of prejudicial errors of the district court in admitting evidence which was irrelevant, confusing and mi<leading. The City is alternatively entitled to a new trial because of prejudicial error of the district court in not allowing the testimony of a witness who would have testified that Morro intentionally avoided testimony in the municipal court.

Furthermore the City is alternatively entitled to a new trial because of a violation of equal protection in the jury selection process as well as the failure of the district court to remove from the jury two jurors who were likely to be prejudiced or biased against the City as indicated by their response to voir dire questions.

Appendix A

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